

Arbitration Law Review

Volume 8 *Yearbook on Arbitration and Mediation*

Article 20

5-1-2016

The Swiss Supreme Court on the Use of Secretaries and Consultants in the Arbitral Process

Tracey Timlin

Follow this and additional works at: <http://elibrary.law.psu.edu/arbitrationlawreview>



Part of the [Dispute Resolution and Arbitration Commons](#)

Recommended Citation

Tracey Timlin, *The Swiss Supreme Court on the Use of Secretaries and Consultants in the Arbitral Process*, 8 *Y.B. Arb. & Mediation* 268 (2016).

This Student Submission - Foreign Decisional Law is brought to you for free and open access by Penn State Law eLibrary. It has been accepted for inclusion in Arbitration Law Review by an authorized editor of Penn State Law eLibrary. For more information, please contact ram6023@psu.edu.

THE SWISS SUPREME COURT ON THE USE OF SECRETARIES AND CONSULTANTS IN THE
ARBITRAL PROCESS

By
Tracey Timlin *

I. INTRODUCTION

Contemporary arbitration is predicated on certain foundational principles. One such principle is that the contract made between the parties controls the character and administration of the arbitral process.¹ In other words, freedom of contract reigns supreme in international arbitration as it allows parties an opportunity to choose the law and processes through which the arbitration of their dispute will be administered.² As a corollary to this principle, parties have the freedom to designate their arbitrator.³ The parties' selection of an arbitrator is considered to be *intuitu personae*, which means "because of the person" or "in view of the person."⁴ This means that the parties have chosen that arbitrator because of that person's particular skills, experience, expertise, or record.⁵ As such, in naming an arbitrator, the parties intend that person to decide their dispute according to his or her own judgment without any outside influences.

Despite these principles, there are some contemporary threats to the notion that the arbitrator designated by the parties is the sole entity administering and deciding the dispute. Specifically, there has been a growing practice in international arbitration of arbitrators using third parties, typically secretaries, to help administer the arbitral process.⁶ As a result, the proper role and duties of arbitral secretaries has been the

* Tracey Timlin is an Associate Editor of the Yearbook on Arbitration and Mediation and a 2017 Juris Doctor Candidate at The Pennsylvania University Dickinson School of Law.

¹ Thomas E. Carbonneau, *The Exercise of Contract Freedom in the Making of Arbitration Agreements*, 36 VAND. J. TRANSNAT'L L. 1189, 1189–1193 (2003) (discussing the primacy of the contract in the administration of an arbitration proceeding).

² See, e.g., THOMAS E. CARBONNEAU, CASES AND MATERIALS ON ARBITRATION LAW AND PRACTICE 27–28 (7th ed. 2015) (providing that the parties are the "ultimate sovereigns" in the arbitral process through the principle of freedom of contract); Carbonneau, *supra* note 1, at 1189–1193 (recognizing that freedom of contract legitimizes the practice of arbitration by giving it a "voluntary character" and providing that freedom of contract "is at the very core of how the law regulates arbitration").

³ See generally Joint Report of the International Commercial Disputes Committee and the Committee on Arbitration of the New York City Bar Association, *Secretaries to International Arbitral Tribunals*, 17 AM. REV. INT'L ARB. 575, 586 (2006) [hereinafter Joint Report] (stating that the fact that the parties choose their arbitrator is a key characteristic of arbitration).

⁴ Michael Polkinghorne & Charles B. Rosenberg, *The Role of the Tribunal Secretary in International Arbitration: A Call for a Uniform Standard*, 8 DISP. RESOL. INT'L 107 (2014).

⁵ Charles J. Moxley, Jr., *Selecting the Ideal Arbitrator*, 69 DISP. RESOL. J., 1, 3–4 (2005).

⁶ See generally Joint Report, *supra* note 3, at 586 (stating that it is "common practice" for arbitrators of international tribunals to appoint secretaries during the arbitral process); Lawrence W. Newman & David Zaslowsky, *The Fourth Arbitrator: Contrasting Guidelines on Use of Law Secretaries*, N.Y. L.J. Nov. 29, 2012, <http://www.newyorklawjournal.com/id=1202579604896/The-Fourth-Arbitrator-Contrasting-Guide>

subject of some debate in recent years.⁷ This debate has led to a spectrum of different approaches taken by various arbitration institutions.⁸ One recent approach is that provided in a May 2015 Swiss Supreme Court decision (“Swiss Decision”).⁹ This decision is important in three respects. First, it provides guidelines for arbitrator use of third parties in Switzerland, which was a question of first impression for the Court.¹⁰ Second, the Court approved of a wide range of duties for secretaries, which allows a basis of comparison to other approaches.¹¹ Third, in addition to its acceptance of secretaries, the Court also permitted arbitrators to use consultants.¹² This presents different challenges in the debate surrounding third party involvement in arbitral proceedings and presents unique issues and questions left unanswered by the court.

II. BACKGROUND

While the possible use of a consultant in an arbitral proceeding is a relatively new addition by the Swiss Supreme Court in the context of the debate surrounding third-party assistants, there has been a fair amount of discussion and discourse on the potential role and duties of secretaries in recent years.¹³ The debates have highlighted the possible

lines-on-Use-of-Law-Secretaries?slreturn=20151023002038 (stating that the practice of using secretaries to assist in the administration of arbitration is fairly common and is particularly common in arbitration taking place in continental Europe).

⁷ See generally Kyriaki Karadelis, *The Role of the Tribunal Secretary*, GLOB. ARB. REV., Dec. 21, 2011, <http://globalarbitrationreview.com/news/article/30051/> (discussing a debate regarding the proper role of secretaries in arbitral tribunals at the Global Arbitration Review Live Event in London in 2011); Clemmie Spalton, *Are Tribunal Secretaries Writing Awards*, GLOB. ARB. REV., Nov. 9, 2012, <http://globalarbitrationreview.com/news/article/30962/are-tribunal-secretaries-writing-awards> (discussing the debate at the Global Arbitration Review Live Event in London in 2012 over the proper role of secretaries in drafting arbitral awards).

⁸ See e.g., International Chamber of Commerce, *Note on the Appointment, Duties and Remuneration of Administrative Secretaries*, 23 INT’L CT. ARB. BULL. 19 (2012) [hereinafter ICC Note]; AMERICAN ARBITRATION ASSOCIATION, *THE CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES* (2004) [hereinafter AAA Code of Ethics]; HONG KONG INTERNATIONAL ARBITRATION CENTRE, 2013 ADMINISTERED ARBITRATION RULES (2013) [hereinafter HKIAC Rules]; INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION, *YOUNG ICCA GUIDE ON ARBITRAL SECRETARIES* (2014) [hereinafter Young ICCA Guide]; HONG KONG INTERNATIONAL ARBITRATION CENTRE, *GUIDELINES ON THE USE OF A SECRETARY TO THE ARBITRAL TRIBUNAL* (2014) [hereinafter HKIAC Guidelines]; Joint Report, *supra* note 3.

⁹ Bundesgericht [BGer][Federal Supreme Court] May 21, 2015, 4A_709/2014 (Switz.).

¹⁰ *Id.*; Kyriaki Karadelis, *Swiss Court Okays Tribunal Assistants*, GLOB. ARB. REV., Aug. 4, 2015, <http://globalarbitrationreview.com/news/article/34037/swiss-court-okays-tribunal-assistants/> (stating that this case was the first for the Swiss Supreme Court on the use of arbitral secretaries and consultants).

¹¹ Bundesgericht [BGer][Federal Supreme Court] May 21, 2015, 4A_709/2014, 51 (Switz.).

¹² *Id.*

¹³ See generally Newman & Zaslowsky, *supra* note 6; Polkinghorne & Rosenberg, *supra* note 4; Courtney J. Restemayer, *Secretaries Always Get a Bad Rep: Identifying the Controversy Surrounding Administrative*

advantages and disadvantages of third party involvement in arbitration proceedings and have resulted in attempts by different agencies, administering institutions, and commentators to provide frameworks or guidelines on the role of third parties in the arbitral process.¹⁴

A. Advantages of Third Party Involvement in the Arbitral Process

1. Advantages of Secretaries

There are various reasons that an arbitrator may want to use a secretary to help conduct the arbitral process. Some of these benefits center around the efficiencies that a secretary might add to the process. For example, at a debate during a Global Arbitration Review event in London in 2011 surrounding the appropriate roles of administrative secretaries in arbitral tribunals, some delegates took the position that a secretary can save the parties money because they demand a lower hourly rate than the arbitrator.¹⁵ Thus, arbitrators can delegate some responsibilities to a secretary that he or she would otherwise have to perform, allowing the parties to pay a lower cost.¹⁶ Along the same lines, a secretary can also make the proceeding more time efficient. One of the reasons that parties choose to arbitrate their disputes is that it provides a more efficient and streamlined process than a judicial proceeding.¹⁷ Thus, where an arbitrator can delegate some responsibilities to a third party and save time, this process may in fact be consistent with the overall goals of arbitration and the individual parties.

Additionally, allowing a third party secretary to assist in the arbitral process may improve decision-making. During the same debate in 2011, one London Court of International Arbitration (LCIA) arbitrator posited that the use of a secretary allows the arbitrator to focus solely on the merits of the dispute rather than any administrative problems or issues.¹⁸ In other words, after delegating some tasks to a secretary, the arbitrator is in a better position decide a case on its merits.¹⁹ Thus, in the sense that

Secretaries, Current Guidelines, and Recommendations, 4 Y.B. ON. ARB. & MEDIATION 328 (2012); Karadelis, *supra* note 7; Spalton, *supra* note 7.

¹⁴ See e.g., ICC Note, *supra* note 8; AAA Code of Ethics, *supra* note 8; HKIAC Rules, *supra* note 8; Young ICCA Guide, *supra* note 8; HKIAC Guidelines, *supra* note 8; Joint Report, *supra* note 3; Polkinghorne & Rosenberg, *supra* note 4; Restemayer, *supra* note 13; Bernhard F. Meyer & Jonatan Baier, *Arbitrator Consultants – Another Way to Deal with Technical or Commercial Challenges of Arbitrations*, 33 ASA BULL. 37 (2015).

¹⁵ Karadelis, *supra* note 7.

¹⁶ Polkinghorne & Rosenberg, *supra* note 4; Karadelis, *supra* note 7.

¹⁷ CARBONNEAU, *supra* note 2, at 14 (highlighting that arbitration is more “flexible” than judicial proceedings because a “reduction of litigious obfuscation results in an economy of time and money”).

¹⁸ Karadelis, *supra* note 7.

¹⁹ Polkinghorne & Rosenberg, *supra* note 4.

parties to an arbitration agreement intend an arbitrator to decide their dispute, a secretary may be beneficial in enabling the arbitrator to better focus on that task.

Another possible benefit to allowing a secretary to participate in the arbitration proceeding is that the secretary himself or herself gets valuable experience. Lawrence W. Newman and David Zaslowsky point out that the secretary to an arbitral tribunal is often young a lawyer serving as something of an apprentice to the experienced arbitrator.²⁰ The experience of working as a secretary to an arbitrator can build this young lawyer's skills in arbitral adjudication.²¹ At a 2012 Global Arbitration Review conference in London, one practitioner compared this system of designating a young lawyer as an arbitrator's secretary to the clerk system in the Supreme Court of the United States.²² Although this comparison was made in direct reference to the debate at that conference surrounding whether secretaries should draft awards, it provides a useful example of a practice in which adjudicator reliance on third party assistance is generally accepted.²³ While this advantage may seem far removed from any the parties receive in a particular dispute, it can benefit the practice of arbitration in the abstract by training young lawyers to someday become experienced arbitrators.

2. *Advantages of Consultants*

The debate over third party involvement in arbitral proceedings has largely centered on secretaries.²⁴ However, there is some support for the use of an arbitral consultant.²⁵ For one, a consultant may similarly increase the efficiencies of arbitration.²⁶ When an arbitrator can rely on a consultant to help answer technical questions that the arbitrator otherwise would have to spend a significant amount of time researching, the consultant may reduce the length of the proceeding.²⁷ Similarly,

²⁰ Newman & Zaslowsky, *supra* note 6.

²¹ *Id.*; Karadelis, *supra* note 7.

²² Spalton, *supra* note 7.

²³ While this comparison may be useful in providing a frame of reference for understanding the nature of an arbitral secretary, it may also be overstated. For one, the nature of the cases before an arbitrator is vastly different from those cases which are before the United States Supreme Court, which almost always serves as the court of last resort. In contrast, the arbitrator tends to serve as something more akin to a court of first instance, the lower level trial court. Thus, the analysis may change when considering that a law clerk to a Supreme Court Justice is not faced with attending the initial hearings, viewing the evidence, and fact-finding for a particular dispute. However, it may also be useful to consider the fact that lower level trial court judges also rely on assistants, secretaries, clerks, or interns. To this end, it may be more useful to compare the experiences of those clerks to that of an arbitral secretary, a comparison which is beyond the scope of this comment.

²⁴ Newman & Zaslowsky, *supra* note 6; Polkinghorne & Rosenberg, *supra* note 4; Karadelis, *supra* note 7; Spalton, *supra* note 7.

²⁵ Meyer & Baier, *supra* note 14; HKIAC Rules, *supra* note 8.

²⁶ Meyer & Baier, *supra* note 14, at 42.

depending on the hourly rate of the consultant and the manner in which he or she is paid, the time savings could also potentially translate into cost savings for the parties.²⁸ Thus, using a consultant may also support the overarching efficiency goal of arbitration.²⁹

Along the same lines, a consultant could also enable an arbitrator to render better decisions. Whereas with a secretary this argument stems from the idea that the arbitrator will be able to focus more on the merits of the dispute,³⁰ the idea here is that a consultant can provide specific expertise on the underlying context of the dispute and enable the arbitrator to better understand it.³¹ In this sense, one could argue that a consultant, in providing technical expertise, can provide a higher level of quality to the decision itself.

B. Disadvantages of Third Party Involvement in Arbitral Proceedings

1. Disadvantages of Secretaries

Despite the advantages, there may also be significant disadvantages to using a third party secretary in an arbitral proceeding. The use of secretaries in arbitral proceedings has been fairly controversial and sparked debate in recent years.³² The disadvantages are often considered in relation to the tasks or duties charged to the secretary. For example, while there may be general acceptance in international arbitration practice towards a secretary performing purely administrative tasks,³³ more controversial tasks tend to include conducting research, attending deliberations and hearings, and drafting awards.³⁴ When performing these types of tasks, the argument goes, a third party secretary becomes more akin to a “fourth arbitrator” than a secretary or administrative assistant.³⁵ This can be a problem because, as mentioned previously,

²⁷ *Id.* at 37.

²⁸ *Id.* at 42.

²⁹ See CARBONNEAU, *supra* note 2, at 14.

³⁰ Karadelis, *supra* note 7; Polkinghorne & Rosenberg, *supra* note 4.

³¹ Bundesgericht [BGer][Federal Supreme Court] May 21, 2015, 4A_709/2014, 51 (Switz.) (providing that a consultant may be used in complex or technical disputes to answer non-legal questions of the arbitrator according to his or her own skill and expertise in the field).

³² Karadelis, *supra* note 7 (discussing a debate regarding the proper role of secretaries in arbitral tribunals at the Global Arbitration Review Live Event in London in 2011); Spalton, *supra* note 7 (discussing the debate at the Global Arbitration Review Live Event in London in 2012 over the proper role of secretaries in drafting arbitral awards).

³³ Polkinghorne & Rosenberg, *supra* note 4 (stating that “it is generally accepted that tribunal secretaries may handle administrative tasks, such as coordinating logistics and secretarial services”).

³⁴ *Id.*

³⁵ See Polkinghorne & Rosenberg, *supra* note 4; Newman & Zaslow, *supra* note 6; Karadelis, *supra* note 7.

arbitrators are chosen *intuitu personae*.³⁶ Thus, if a secretary performs tasks which the parties left solely to the authority of the arbitrator, the arbitrator's use of a secretary may violate the party's contract.

When considering the nature of these more controversial tasks, it can become more apparent why they have the potential to violate the principle of *intuitu personae*. With respect to conducting research, the means chosen by a secretary may ultimately impact the final decision.³⁷ As Michael Polkinghorne and Charles Rosenberg state, "[S]ome express concern that any summary or research performed by the tribunal secretary necessarily bears the secretary's perspective and thus might improperly influence the arbitrator's own evaluation."³⁸ Further, the secretary's position or perspective might become even more apparent if he or she is responsible for drafting part or all of the award. In choosing to arbitrate, parties bargained for an award rendered their chosen arbitrator.³⁹ Thus, the very act of someone other than the arbitrator drafting the award might be problematic. One practitioner at the 2011 debate in London suggested that even allowing the secretary to draft the "mechanistic" parts of award, such as the facts or procedure, is a problem because the arbitrator's act of thinking through the facts and the parties' arguments is "key" to decision-making.⁴⁰ This problem of drafting can be compounded by the secretary's attendance at deliberations and hearings.⁴¹ If the secretary has personally witnessed the arguments and evidence in that case, he or she does not have to solely rely on the direction of the arbitrator in how to draft the award. Thus, the disadvantages of using a secretary in an arbitration proceeding go to the heart of the party's contract and the fundamental principles of *intuitu personae*.

2. Disadvantages of Consultants

Consultants pose many of the same dangers to the arbitral process as secretaries. Although there is a potential that a consultant may make the process more efficient,⁴² the opposite might be true. A secretary is seen to increase cost efficiency because he or she can perform work that the arbitrator would otherwise have to perform at a lower hourly

³⁶ Moxley, *supra* note 5, at 3-4; David McLean, *Selecting a Party-Appointed Arbitrator in the US*, Nov. 11, 2014, <https://www.lw.com/thoughtLeadership/appointed-arbitrator-us-mclean>; Polkinghorne & Rosenberg, *supra* note 4.

³⁷ Polkinghorne & Rosenberg, *supra* note 4.

³⁸ *Id.*

³⁹ See generally CARBONNEAU, *supra* note 2, at 14 (stating that parties choose their arbitrators in consideration of that arbitrator's particular skills and expertise to "avoid inexpert judges who may be prone to impose legalistic solutions upon commercial problems"); Moxley, *supra* note 5, at 3-4; McLean, *supra* note 36.

⁴⁰ Karadelis, *supra* note 7.

⁴¹ Polkinghorne & Rosenberg, *supra* note 4.

⁴² See Meyer & Baier, *supra* note 14, at 42.

rate.⁴³ However, a consultant is appointed to provide additional advice, expertise, or assistance to the arbitrator that the parties may not otherwise have expected or intended. Thus, using a consultant, especially one with a high hourly rate, may increase the overall cost to the parties.⁴⁴

Additionally, the use of a consultant has the potential to violate those same fundamental principles of freedom of contract and *intuitu personae* as discussed in respect to secretaries. In providing advice or guidance to the arbitrator on a particular technical aspect of the dispute, the consultant may be unable to separate his or her own personal perspective or bias. This is similar to the criticism regarding a secretary conducting research.⁴⁵ Further, although a consultant may not be tasked with drafting an award, it may be similarly problematic to have them in attendance at hearings and deliberations. Any slant the consultant possesses regarding the facts, underlying context, or even merits of the dispute can impact the way he or she sees the case and provides information to the arbitrator. Thus, if the consultant can attend or even participate in deliberations, this can have a direct effect on the arbitrator's decision-making.

C. Survey

There are many different competing standards, guidelines, and model rules on the proper role of third party secretaries which have emerged from various arbitration administering institutions and groups, and commentators.⁴⁶ In addition, there are some references to the idea of an arbitral consultant.⁴⁷ A discussion and comparison of these various standards is useful in demonstrating the spectrum of perspectives on third party involvement in arbitral proceedings.

⁴³ Karadelis, *supra* note 7; Polkinghorne & Rosenberg, *supra* note 4.

⁴⁴ Those cost-efficiency problems with a consultant are dependent on the way a consultant is paid. If the parties are responsible for paying the costs of the consultant, the arbitrator's reliance on a consultant can be said to increase the cost-efficiency for the parties. However, if the arbitrator or arbitral institution pays for the consultant, the use of a consultant may not increase the cost for the parties. Even so, using a consultant does not necessarily increase the cost-efficiency benefits for the parties. These issues may be further complicated by the ideas discussed previously that a consultant could increase the time-efficiency overall, which can impact the cost-efficiency of the dispute. Thus, these are questions that are best considered with respect to the particulars of each individual case.

⁴⁵ Polkinghorne & Rosenberg, *supra* note 4.

⁴⁶ See e.g., ICC Note, *supra* note 8; AAA Code of Ethics, *supra* note 8; HKIAC Rules, *supra* note 8; Young ICCA Guide, *supra* note 8; HKAIC Guide, *supra* note 8; Joint Report, *supra* note 3; Polkinghorne & Rosenberg, *supra* note 4; Restemayer, *supra* note 13.

⁴⁷ HKIAC Rules, *supra* note 8; Meyer & Baier, *supra* note 14.

1. Arbitration Administering Institutions

Many leading arbitration organizations have taken stances on the practice of having an arbitral secretary.⁴⁸ For example, the International Chamber of Commerce (ICC)⁴⁹ Rules are silent on the issue of secretaries to an arbitral tribunal.⁵⁰ However, in 2012, the ICC issued a Note on the Appointment, Duties, and Remuneration of Administrative Services (“Note”) to provide guidance on the issue.⁵¹ This Note allows for the use of secretaries provided they meet the same requirements of independence and impartiality as an arbitrator⁵² and provides a list of tasks that the secretaries may perform.⁵³ In addition to some more administrative tasks, this list also includes “attending hearings, meetings and deliberations; taking notes or minutes or keeping time” and “conducting legal or similar research.”⁵⁴ However, the Note then provides that the arbitrator may not “delegate decision-making functions” or allow the secretary to “perform any essential duties of an arbitrator.”⁵⁵ The Note also provides that an arbitrator has a “duty personally to review the file and/or to draft any decision of the Arbitral Tribunal.”⁵⁶

The American Arbitration Association (AAA)⁵⁷ takes a slightly different view. In 2004, the AAA published *The Code of Ethics for Arbitrators in Commercial Disputes*, which also allows for the use of secretaries in arbitral proceedings.⁵⁸ The AAA states,

⁴⁸ This Part is not meant to provide an exhaustive survey of all arbitration institutions, but rather to provide some examples to illustrate the various possible approaches.

⁴⁹ The ICC is a “leading provider” in dispute resolution services worldwide and is headquartered in Paris, France. *See generally* ICC: INTERNATIONAL CHAMBER OF COMMERCE, *ICC Dispute Resolution Services*, <http://www.iccwbo.org/about-icc/organization/dispute-resolution-services/> (last visited Feb. 26, 2016).

⁵⁰ ICC: INTERNATIONAL CHAMBER OF COMMERCE, *ICC Rules of Arbitration*, <http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/icc-rules-of-arbitration/> (last visited Feb. 26, 2016).

⁵¹ ICC Note, *supra* note 8.

⁵² *Id.* at 1.

⁵³ The list of appropriate tasks includes “transmitting documents and communications on behalf of the Arbitral Tribunal; organizing and maintaining the Arbitral Tribunal’s file and locating documents; organizing hearings and meetings” among others. *Id.* at 2.

⁵⁴ ICC Note, *supra* note 8.

⁵⁵ ICC Note, *supra* note 8.

⁵⁶ *Id.*

⁵⁷ The AAA is a leader in alternative dispute resolution headquartered in the United States. *See generally* AMERICAN ARBITRATION ASSOCIATION, *About the American Arbitration Association (AAA) and the International Centre for Dispute Resolution (ICDR)*, https://www.adr.org/aaa/faces/s/about?_afzLoop=4175604162708177&_afzWindowMode=0&_afzWindowId=19iae40ysz_52#%40%3F_afzWindowId%3D19iae40ysz_52%26_afzLoop%3D4175604162708177%26_afzWindowMode%3D0%26_adf.ctrl-state%3D19iae40ysz_96 (last visited Feb. 26, 2016).

⁵⁸ AAA Code, *supra* note 8.

“An arbitrator may obtain help from an associate, a research assistant or other persons in connection with reaching his or her decision...”⁵⁹ It is interesting to note that this language may be broad enough to include a consultant considering that it is not explicitly limited to secretaries. Regardless, any reliance on a third party assistant is predicated on informing the parties.⁶⁰ In addition, while there is no list of tasks that a secretary is eligible to perform, the AAA also expressly provides that an arbitrator may not delegate any decision making authority to anyone.⁶¹

The London Court of International Arbitration (LCIA)⁶² also does not have specific rules governing secretaries to an arbitral tribunal. However, on the organization’s webpage, LCIA provides a brief description of its position on the appointment of secretaries to its tribunals.⁶³ The description states that the LCIA allows for the appointment of secretaries, but specifically provides that “[t]he duties of the administrative secretary should neither conflict with those for which the parties are paying the LCIA Secretariat,⁶⁴ nor constitute any delegation of the Tribunal’s authority.”⁶⁵ It also provides that even for administrative tasks like scheduling, the Secretariat maintains final authority.⁶⁶ It then provides a sampling of the tasks which a secretary can perform, which includes “organising papers for the Tribunal, highlighting relevant legal authorities, maintaining factual chronologies, keeping the Tribunal’s time sheets and so forth.”⁶⁷

The Hong Kong International Arbitration Centre (HKIAC)⁶⁸ does mention the use of arbitral secretaries specifically in its rules. Article 13.4 of the HKIAC Administered Arbitration Rules states that an arbitral tribunal may appoint a secretary “after consulting

⁵⁹ *Id.* at 7.

⁶⁰ *Id.*

⁶¹ *Id.* at 6.

⁶² The LCIA is a “leading institution for commercial dispute resolution” headquartered in London, England. *See generally* LCIA: ARBITRATION AND ADR WORLDWIDE, *Introduction*, <http://www.lcia.org/LCIA/introduction.aspx> (last visited Feb. 26, 2016).

⁶³ LCIA: ARBITRATION AND ADR WORLDWIDE, *Frequently Asked Questions*, http://www.lcia.org/Frequently_Asked_Questions.aspx#Secretaries (last visited Feb. 26, 2016) [hereinafter LCIA FAQ].

⁶⁴ The Secretariat of the LCIA is the entity which handles all the day-to-day administration for disputes. *See generally* LCIA: ARBITRATION AND ADR WORLDWIDE, *Organisation*, <http://www.lcia.org/LCIA/organisation.aspx> (last visited Feb. 26, 2016).

⁶⁵ LCIA FAQ, *supra* note 63.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ The HKIAC is a leading arbitral institution headquartered in Hong Kong which is prominent in the Asia-Pacific Region. *See generally* HKIAC: HONG KONG INTERNATIONAL ARBITRATION CENTRE, *Why HKIAC?*, <http://www.hkiac.org/arbitration/why-choose-hkiac> (last visited Feb. 26, 2016).

with the parties.”⁶⁹ The rule then states that the secretary must remain independent and provide disclosures to ensure that he or she will be impartial during the proceedings.⁷⁰ However, the HKIAC also provides rules which govern something similar to the “consultant” of the Swiss Supreme Court. Article 25 deals with “Tribunal-Appointed Experts” and provides: “To assist it in the assessment of evidence, the arbitral tribunal, after consulting with the parties, may appoint one or more experts.”⁷¹ It then further provides that the arbitrator may meet with this expert privately and that the expert will provide a written report to the tribunal on the issues of the dispute.⁷² However, this written report is also provided to the parties for their consideration and comment, and the parties may request a hearing in which they can question the expert on his or her findings.⁷³

2. Model Rules

Some major arbitral institutions have published their own guidelines or model rules on the issue of secretary involvement in an arbitral forum. For example, in 2014 an entity formed under the umbrella of the International Council for Commercial Arbitration (ICCA)⁷⁴ named Young ICCA⁷⁵ published a Guide on Arbitral Services (“Guide”) which sought to remedy some of the problems surrounding the use of arbitral secretaries.⁷⁶ This Guide was produced by the Young ICCA Task Force on the Appointment and use of Arbitral Secretaries in order to “examine the use of arbitral secretaries and advance a more transparent and robust approach to the role of secretaries in arbitration.”⁷⁷ The Guide explicitly provides that the secretary’s roles can extend beyond the purely administrative to include such things as “researching questions of law,” “attending the arbitral tribunal’s deliberations,” and “drafting appropriate parts of the award.”⁷⁸

⁶⁹ HKIAC Rules, *supra* note 8, at 21.

⁷⁰ *Id.*

⁷¹ *Id.* at 29.

⁷² *Id.*

⁷³ *Id.* at 30.

⁷⁴ The ICCA is an international NGO which aims to improve the practice of arbitration worldwide. *See generally* ICCA: INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION, *International Council for Commercial Arbitration*, <http://www.arbitration-icca.org/about.html> (last visited Feb. 26, 2016).

⁷⁵ Young ICCA is an organization under the auspices of the ICCA which is aimed at providing a network for young professionals in arbitration and dispute resolution. YOUNG ICCA, *About Young ICCA*, <http://www.arbitration-icca.org/YoungICCA> (last visited Feb. 26, 2016).

⁷⁶ Young ICCA Guide, *supra* note 8.

⁷⁷ *Id.* at 1.

⁷⁸ *Id.* at 11.

However, the Guide also provides that a secretary must be appointed “with the knowledge and consent of the parties.”⁷⁹

In addition to its own rules governing the appointment of arbitral secretaries, the HKIAC also recently promulgated its own Guidelines on the Use of a Secretary to the Arbitral Tribunal (“Guidelines”), effective June 1, 2014.⁸⁰ These Guidelines can apply in arbitrations administered by HKIAC under its own rules, arbitrations under the UNCITRAL rules, or in other cases after consulting with HKIAC.⁸¹ The Guidelines state that an arbitral secretary may be appointed by the tribunal once it has notified the parties and provided disclosures regarding the particular secretary to the parties to ensure impartiality.⁸² The Guidelines also provide a list of administrative tasks and a list of non-administrative tasks which the secretary may perform.⁸³ These lists provide that the secretary may attend deliberations, conduct research, and draft “non-substantive” parts of the awards provided that the tribunal “ensures that the secretary does not perform any decision-making function or otherwise influence the arbitral tribunal’s decisions in any manner.”⁸⁴ Both Young ICCA and HKIAC were nominated for a Global Arbitration Review (GAR) award for their efforts to define guidelines and model rules in this area.⁸⁵

3. Commentators

In addition to the rules, guidelines, and proposals provided by the various arbitral institutions outlined above,⁸⁶ various commentators have also suggested standards to address the problems surrounding third party involvement in the arbitral process.⁸⁷ These approaches vary depending on what the commentator believes to be the most important element of the debate. For example, some prize uniformity,⁸⁸ while others favor efficiency and expertise.⁸⁹ This section will consider two examples⁹⁰ of proposals for

⁷⁹ *Id.* at 5.

⁸⁰ HIAC Guidelines, *supra* note 8.

⁸¹ *Id.* at 1.

⁸² *Id.* at 1-2.

⁸³ *Id.* at 3.

⁸⁴ HKIAC Guidelines, *supra* note 8.

⁸⁵ Spalton, *supra* note 7.

⁸⁶ See discussion *supra* Parts II.C.1 and II.C.2.

⁸⁷ See e.g., Polkinghorne & Rosenberg, *supra* note 4; Restemayer, *supra* note 8; Meyer & Baier, *supra* note 14.

⁸⁸ See e.g., Polkinghorne & Rosenberg, *supra* note 4.

⁸⁹ See e.g., Meyer & Baier, *supra* note 14.

introducing third parties into the arbitral process more effectively or fairly: one focused on secretaries and one focused on consultants.

For secretaries, Michael Polkinghorne and Charles Rosenberg attempt to introduce a uniform standard for the role of secretaries in the arbitral process.⁹¹ The goal in introducing a uniform standard was to help ease some of the debate on the issue which could allow instances of “abuse.”⁹² To Polkinghorne and Rosenberg, the lack of uniformity on the proper role of secretaries “might negatively affect the perceived legitimacy of the arbitral process and the resulting award.”⁹³ To that end, they suggested eight standards which could serve as uniform guideposts across different jurisdictions and arbitral institutions.⁹⁴ These standards address the possible impartiality of the secretary and the remuneration of a secretary as well as considering the various duties a secretary could perform.⁹⁵ For these duties, the standards address “(i) organisational and administrative tasks; (ii) research; (iii) attendance at deliberations; (iv) draft[ing] procedural orders and non-substantive portions of awards; (v) draft[ing] substantive portions of awards; and (vi) decision-making.”⁹⁶ Through these various standards, the ultimate goal of this proposal is to achieve uniformity in the way to address and regulate secretarial involvement in arbitration.⁹⁷ This will allow parties and arbitral institutions to have greater certainty over the role of secretaries so that arbitration can be conducted in accordance with the reasonable expectations of everyone involved.⁹⁸

Bernhard F. Meyer and Jonatan Baier have different emphases in their proposal for using consultants in the arbitral process: efficiency and expertise.⁹⁹ Meyer and Baier point out that arbitration often involves complex and technical cases, which requires the parties to either have specialist arbitrators or to spend time and resources trying to educate an arbitral tribunal on the complex aspects of a dispute.¹⁰⁰ To that end, they suggest the use of an “Arbitrator Consultant” who will work to assist the arbitral tribunal to “‘translate’ [the] factual and legal decisions into the technical or commercial language

⁹⁰ This is not meant to suggest that there are only two proposals to be considered. Rather, these examples are just meant to illustrate the positions that commentators have taken on the subject of third party involvement.

⁹¹ Polkinghorne & Rosenberg, *supra* note 4.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ Polkinghorne & Rosenberg, *supra* note 4.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ Meyer & Baier, *supra* note 14.

¹⁰⁰ *Id.* at 37.

of the contract, or *vice versa*.”¹⁰¹ In this way, an “Arbitrator Consultant” can save time and money and ensure a level of quality and expertise to the award.¹⁰²

These examples illustrate three important things. First, they demonstrate the fact that there are various proposals to fix and change the way third parties are used in the arbitral process. Second, they demonstrate that the stance one takes depends on what one considers to be the paramount concern or issue surrounding third party involvement. Third, the example of Meyer and Baier is important in illustrating that proposals such as these can have impact on judicial opinion, as their article was cited in the recent Swiss Decision upholding the use of both arbitral secretaries and consultants.¹⁰³

III. DECISION 4A_709/2014 OF THE SWISS SUPREME COURT

Despite the various attempts to address and solve the problems surrounding arbitrator use of third parties in the arbitral process discussed above, there is still a lack of uniformity on the issue and new problems continue to emerge. One of the most recent judicial opinions on this topic is a Swiss Supreme Court decision dated to May 21, 2015 (“Swiss Decision”) in which the court upheld not only an arbitrator’s use of an administrative secretary, but also the use of a consultant.¹⁰⁴ The use of administrative secretaries or consultants was an issue of first impression for the Swiss Supreme Court,¹⁰⁵ and the decision may now serve as precedent for the use of secretaries and consultants in that jurisdiction. This case demonstrates some of the problems that have been consistently debated over the proper role of secretaries in an arbitral proceeding and what tasks they may perform in order to be consistent with principles of freedom of contract and *intuitu personae*. In addition, this case also raises somewhat more novel questions surrounding arbitral consultants.

A. Background

On November 20, 2012, a Luxembourg company (“Party A”)¹⁰⁶ contracted with a Swiss company (“Party B”)¹⁰⁷ for the latter to act as the general contractor on the renovation of a building in Biel, Switzerland.¹⁰⁸ The contract contained an arbitration

¹⁰¹ *Id.* at 41.

¹⁰² *Id.* at 42.

¹⁰³ Bundesgericht [BGer][Federal Supreme Court] May 21, 2015, 4A_709/2014, 51 (Switz.).

¹⁰⁴ Bundesgericht [BGer][Federal Supreme Court] May 21, 2015, 4A_709/2014 (Switz.).

¹⁰⁵ Karadelis, *supra* note 10.

¹⁰⁶ This party is referred to by the Court as “B” throughout the decision. Bundesgericht [BGer][Federal Supreme Court] May 21, 2015, 4A_709/2014, 21 (Switz.).

¹⁰⁷ This party is referred to by the Court as “A” throughout the decision. *Id.*

¹⁰⁸ *Id.*

clause which provided that the disputes arising between the parties would be settled in arbitration by a single arbitrator (“Arbitrator”)¹⁰⁹ named in the agreement.¹¹⁰ A year prior to the formation of this contract, Party A had entered into a contract with a company to serve as an architect.¹¹¹ The Arbitrator, in addition to being named in the contract between Party A and Party B, served as the Chairman of that company.¹¹²

A dispute arose between the parties regarding their respective duties under the contract.¹¹³ On April 9, 2014, Party A submitted a request for arbitration to the Arbitrator.¹¹⁴ In considering the Arbitrator’s prior contractual relationship with Party A, Party B moved on May 6, 2014 that the Arbitrator recuse himself from the arbitral process.¹¹⁵ On June 2, 2014, the Arbitrator refused Party B’s request for recusal, and on September 23, 2014 an interlocutory court upheld the arbitrator’s decision on the grounds that Party B knew at the time of contract formation that the Arbitrator had a relationship with Party A.¹¹⁶

After this initial challenge to his authority, the Arbitrator conducted the arbitral proceeding with the assistance of a secretary (“Secretary”)¹¹⁷ and a legal consultant (“Consultant”)¹¹⁸ whom he unilaterally appointed.¹¹⁹ The Arbitrator rendered a final award on November 14, 2014 which ordered Party B to pay Party A a sum of 2,459,324.08 francs (\$2,466,961.26) with an interest of 5% per year and the costs of arbitration, set at 70,000 francs (\$70,217.38).¹²⁰

B. Basis of the Appeal

On December 17, 2014 Party B filed an appeal in the Swiss courts arguing several violations of the Private International Law Act (PILA).¹²¹ Chapter 12 of PILA contains

¹⁰⁹ The arbitrator is referred to by the Court as “D” throughout the decision. *Id.* at 23.

¹¹⁰ *Id.* at 22-23.

¹¹¹ Bundesgericht [BGer][Federal Supreme Court] May 21, 2015, 4A_709/2014, 21 (Switz.).

¹¹² *Id.*.

¹¹³ Bundesgericht [BGer][Federal Supreme Court] May 21, 2015, 4A_709/2014, 24 (Switz.).

¹¹⁴ *Id.* at 25.

¹¹⁵ *Id.* at 27.

¹¹⁶ *Id.* at 28.

¹¹⁷ This party is referred to by the court as “F” throughout the decision. *Id.* at 44.

¹¹⁸ This party is referred to by the court as “E” through the decision. Bundesgericht [BGer][Federal Supreme Court] May 21, 2015, 4A_709/2014, 44 (Switz.).

¹¹⁹ *Id.*

¹²⁰ *Id.* at 30-32.

¹²¹ *Id.* at 33.

the Swiss law on international arbitration.¹²² Article 190 of the PILA deals with the finality of an arbitral award and the potential grounds for a successful appeal.¹²³ It provides in relevant part:

2. The award may only be annulled:
 - a) if the sole arbitrator was not properly appointed or if the tribunal was not properly constituted;
 - b) if the arbitral tribunal wrongly accepted or declined jurisdiction;
 - c) if the arbitral tribunal's decision went beyond the claims submitted to it, or failed to decide one of the items of the claim;
 - d) if the principle of equal treatment of the parties or the right of the parties to be heard was violated;
 - e) if the award is incompatible with public policy.¹²⁴

In seeking review of the arbitrator's decision, Party B alleged violations of all subsections of Article 190, section 2 except for subsection b.¹²⁵ However, the only claim relevant for this discussion is Party B's allegation under Article 190, section 2(a) that the arbitral tribunal was improperly constituted.

The crux of B's argument was that the arbitration agreement made between Party A and Party B named a single specified arbitrator.¹²⁶ Thus, Party B argued that the arbitral tribunal was improperly constituted, and the award therefore subject to annulment under Article 190, section 2(a) of the PILA, because the tribunal consisted of parties who were acting as arbitrators despite not having been named as such in the agreement.¹²⁷ In other words, Party B argued that the Arbitrator's appointment of Secretary and Consultant violated the parties' agreement because Secretary and Consultant provided more than just administrative support to the Arbitrator.¹²⁸

In contrast, Party A argued that the contributions made by Secretary and Consultant were solely administrative in nature and that the two were the equivalent of

¹²² Bundesgesetz das Internationale Privatrecht [IPRG] [Private International Law Act] Dec. 18, 1987 (Switz). See generally Harold Frey, Xavier Favre-Bulle, Martin Aebi, & Lenz & Staehelin, *Arbitration Procedures and Practice in Switzerland: Overview*, PRACTICAL L. (Aug. 1, 2015), <http://us.practicallaw.com/5-502-1047> (providing that the law of arbitration in Switzerland is not based on the UNCITRAL model law, but rather Chapter 12 of the Federal Private International Law Act which applies to any arbitration if "the seat of the tribunal is in Switzerland" and "[a]t least one of the parties had neither its domicile nor its habitual residence in Switzerland at the time the arbitration agreement was concluded").

¹²³ Bundesgesetz das Internationale Privatrecht [IPRG] [Private International Law Act] Dec. 18, 1987, art. 190 (Switz).

¹²⁴ *Id.*

¹²⁵ Bundesgericht [BGer][Federal Supreme Court] May 21, 2015, 4A_709/2014, 33 (Switz.).

¹²⁶ *Id.* at 44.

¹²⁷ *Id.*

¹²⁸ *Id.*

legal secretaries.¹²⁹ In addition, Party A argued that the Arbitrator had notified the parties in a letter dated May 21, 2014 of his intention to use Secretary and Consultant for administrative support during the arbitral process.¹³⁰ Therefore, Party A argued, Party B should have objected to Secretary and Consultant's participation at that time, and not for the first time on appeal from a final and binding arbitral award.¹³¹

C. Rationale

The First Civil Law Division of the Federal Supreme Court ("Court")¹³² began its decision by recognizing the fundamental principle of *intuitu personae* with respect to the selection of an arbitrator.¹³³ The Court acknowledged that this principle provides that the duties and obligations of the named arbitrator cannot be delegated to a third party.¹³⁴ With this in mind, the Court highlighted that the named arbitrator must maintain sole control over the outcome of the dispute and cannot delegate any decision-making authority to a third party.¹³⁵ However, despite this limitation, the Court did not preclude all contribution in the arbitral process by a third party.¹³⁶ In fact, the court suggested that even though the PILA does not mention the use of a secretary during the arbitral process, such a use is generally accepted in practice and fully supportable.¹³⁷

In reaching this conclusion, the court outlined some of the regular tasks of a legal secretary. These include preparing for hearings, organizing documents, maintaining the record, and other tasks that might typically be thought of as purely administrative.¹³⁸ However, the court also provided that a legal secretary is not precluded from drafting an arbitral award, so long as this drafting is done according to parameters set forth by the arbitrator.¹³⁹ As a corollary to this proposition, the court also provided that a legal

¹²⁹ *Id.* at 45.

¹³⁰ Bundesgericht [BGer][Federal Supreme Court] May 21, 2015, 4A_709/2014, 45 (Switz.).

¹³¹ Bundesgericht [BGer][Federal Supreme Court] May 21, 2015, 4A_709/2014, 45 (Switz.).

¹³² The Bundesgericht is the Federal Supreme Court of Switzerland and has seven divisions. The First Civil Law Division deals with complaints in several areas, including international arbitration. This gave the First Civil Law Division jurisdiction over this dispute. See BUNDESGERICHT, *Die Erste zivilrechtliche Abteilung*, <http://www.bger.ch/index/federal/federal-inherit-template/federal-gericht/federal-gerichts-geschaeftsverteilung/federal-gerichts-geschaft-erstezivilabteilung.htm> (last visited Feb. 26, 2016).

¹³³ Bundesgericht [BGer][Federal Supreme Court] May 21, 2015, 4A_709/2014, 49 (Switz.).

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.* at 50.

¹³⁷ *Id.*

¹³⁸ Bundesgericht [BGer][Federal Supreme Court] May 21, 2015, 4A_709/2014, 50 (Switz.).

¹³⁹ *Id.*

secretary should attend the hearings and deliberations of the arbitral tribunal.¹⁴⁰ Following this arguably broad grant of authority to arbitral secretaries, the Court provided as the sole limitation that the arbitrator may not delegate to the secretary any and all judicial functions, that is, the actual decision-making authority of the arbitrator.¹⁴¹ Decision-making is the core function of an arbitrator, and as such, it may not be delegated.¹⁴²

Following its decision to accept the use of a legal secretary in arbitral proceedings, the Court then took an even further step in allowing third parties into arbitration. The court held that in certain arbitral proceedings, which are complex or technical in nature, an arbitrator may make use of consultants.¹⁴³ These consultants can help answer questions the arbitrator may have on the technical aspects of the dispute, but the scope of their authority is limited to non-legal questions posed by the arbitrator to ensure that there is no delegation of decision-making authority.¹⁴⁴ The court did acknowledge that there were risks with this approach.¹⁴⁵ However, the Court still held that consultants could be appointed *sua sponte* by the arbitrator without consent of the parties.¹⁴⁶

D. Application of the Court's Rationale to the Case Before It

The Court upheld the Arbitrator's use of the Secretary and Consultant.¹⁴⁷ In its decision, the Court considered the fact that the Arbitrator had sent a letter to the parties on May 21, 2014 which indicated his intention to use not only a legal secretary, but also a consultant who specializes in arbitration procedure.¹⁴⁸ Further, the Court considered the reason provided by the Arbitrator for using the Consultant, which the Arbitrator provided in the final arbitral award of November 14, 2014.¹⁴⁹ In this award, the Arbitrator suggested that Party B's attempt to recuse the Arbitrator evinced Party B's hostile

¹⁴⁰ *Id.*

¹⁴¹ Bundesgericht [BGer][Federal Supreme Court] May 21, 2015, 4A_709/2014, 50 (Switz.).

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 51.

¹⁴⁵ The Court did not elaborate on or analyze the potential risks of a consultant to the arbitral process. Rather, quickly disposed of the issue with a citation to a piece by Bernhard F. Meyer and Jonathan Baier which discussed the possible advantages and risks. Bundesgericht [BGer][Federal Supreme Court] May 21, 2015, 4A_709/2014, 51 (Switz.) (citing Meyer & Baier, *supra* note 14, at 42).

¹⁴⁶ Bundesgericht [BGer][Federal Supreme Court] May 21, 2015, 4A_709/2014, 51 (Switz.).

¹⁴⁷ *Id.* at 65.

¹⁴⁸ *Id.* at 54.

¹⁴⁹ *Id.* at 57.

attitude toward the Arbitrator's authority.¹⁵⁰ As a result, the Arbitrator relied on Consultant as an arbitration expert solely to ensure his own compliance with proper arbitration procedure.¹⁵¹ Further, the Court accepted the Arbitrator's statement that despite the presence and assistance of the Secretary and Consultant, he rendered the award according to his own knowledge and understanding of the merits of the dispute.¹⁵² Thus, the Arbitrator had not delegated any decision-making authority to Secretary or Consultant in the eyes of the Court and there was no evidence that either Secretary or Consultant acted as something more akin to a co-arbitrator.¹⁵³

IV. POTENTIAL PROBLEMS WITH THE SWISS DECISION

Many of the issues decided on by the Court in the Swiss Decision have been central elements of the debates and controversies surrounding the use of secretaries in arbitral proceedings.¹⁵⁴ Thus, the Swiss Decision sets precedential guidelines on the appropriate role of both secretaries, and now consultants, taking place in that jurisdiction. Within the spectrum of different positions taken on the proper role and regulation of third parties in arbitral proceedings discussed above, this decision should be characterized as somewhat liberal.¹⁵⁵ This characterization is largely due to the Court's broad grant of authority to both secretaries and consultants without requiring party consent. While this approach may have discrete advantages,¹⁵⁶ it also demonstrates some fundamental problems and concerns that may negatively impact party autonomy, freedom of contract, and the principle of *intuitu personae*.

A. Problems with Respect to the Arbitrator's Use of a Secretary

The Swiss Supreme Court held that in addition to performing those tasks which are deemed to be more administrative or secretarial in nature, an arbitrator's secretary may also attend hearings and deliberations and draft arbitral awards so long as the arbitrator does not delegate any decision-making functions.¹⁵⁷ There are four potential issues with this holding. The first three deal with the proper duties or roles of secretaries in whether or not they should perform administrative tasks, draft arbitral awards, or

¹⁵⁰ *Id.*

¹⁵¹ Bundesgericht [BGer][Federal Supreme Court] May 21, 2015, 4A_709/2014, 57 (Switz.).

¹⁵² *Id.* at 59.

¹⁵³ *Id.* at 64.

¹⁵⁴ See generally Newman & Zaslowsky, *supra* note 6; Polkinghorne & Rosenberg, *supra* note 4; Karadelis, *supra* note 7; Spalton, *supra* note 7.

¹⁵⁵ See discussion *supra* Parts II.C.1 and II.C.2.

¹⁵⁶ See discussion *supra* Parts II.A.1 and II.A.2.

¹⁵⁷ Bundesgericht [BGer][Federal Supreme Court] May 21, 2015, 4A_709/2014, 50 (Switz.).

attend hearings and deliberations. The last issue is whether or not the court's sole limitation of non-delegation of decision-making authority is sufficient to protect the rights of the parties.

1. *A Secretary's Role in Performing Administrative Tasks*

An arbitrator's reliance on a secretary to perform purely administrative tasks may be the most innocuous version of third party assistance. In fact, there is some evidence to suggest that this role of a secretary is generally accepted within the practice of international arbitration.¹⁵⁸ A 2012 survey used by Young ICCA in its efforts to produce its Guidelines on the subject indicated that 95% of those surveyed approved of the use of arbitral secretaries.¹⁵⁹ Further, when asked what types of tasks an arbitral secretary should perform, there were high approval rating for those tasks which are likely to be considered more administrative in nature, such as the organization of meetings and the handling of party correspondence.¹⁶⁰

This general approval of a secretary performing administrative tasks might also be supported by some of the rules of the arbitral institutions previously discussed.¹⁶¹ For example, in its Note, the ICC provided that a secretary "may perform organizational and administrative tasks" for the purpose of assisting in the administration of the arbitral process.¹⁶² The Note subsequently provides examples of what may be considered such tasks, and includes things like "organizing and maintaining the Arbitral Tribunal's file and locating documents" and "organizing hearings and meetings."¹⁶³ Similarly, HKIAC's recent Guidelines on the subject provide that a secretary "may perform organizational and administrative tasks."¹⁶⁴

Thus, the Court's decision that an arbitral secretary may perform administrative tasks is less controversial than its decision to allow secretaries to perform more substantive duties. As indicated above, the Court's position on administrative tasks is relatively consistent with general international standards and practice. In addition, the

¹⁵⁸ Polkinghorne & Rosenberg, *supra* note 4 (stating that "it is generally accepted that tribunal secretaries may handle administrative tasks, such as coordinating logistics and secretarial services").

¹⁵⁹ Young ICCA Guide, *supra* note 8, at 2 (the survey was conducted in preparation for the 2012 ICCA Congress in Singapore. The panel prepared and sent a survey to a "cross-section of international arbitration practitioners, users, and providers." The question asked in relation to this 95% approval rating was "Whether arbitral secretaries should be used?").

¹⁶⁰ *Id.* (the question posed by the survey was "What should be the role of an arbitral secretary?" The survey then identified tasks from which the participant was to choose. For "organizing meetings and hearings with the parties" the approval rate was 88.2%. For "handling correspondence and evidence" the approval rate was 79.6%. For "reminding parties of meetings and deadlines" the approval rate was 74.2%).

¹⁶¹ These examples are merely meant to illustrate the point, not to suggest an exhaustive representation of the rules on secretarial involvement in arbitral proceedings regarding administrative duties.

¹⁶² ICC Note, *supra* note 8.

¹⁶³ *Id.*

¹⁶⁴ HKIAC Guidelines, *supra* note 8.

idea of a secretary to an arbitral tribunal performing administrative tasks does not suggest the same violations of freedom of contract and *intuitu personae* as might other duties. An arbitrator may be selected because of his or her own personal skills and expertise in the subject matter of the dispute,¹⁶⁵ but is unlikely to be chosen for his or her skills in performing traditional secretarial or administrative tasks. Further, when a secretary performs administrative tasks, it becomes less likely that he or she is performing any decision-making functions as prohibited by the Court.¹⁶⁶ Thus, for administrative duties, it might simply be the case that the advantages of secretaries largely outweigh the disadvantages.¹⁶⁷

2. *A Secretary's Role in Drafting Arbitral Awards*

One of the most controversial topics in the debate surrounding the use of arbitral secretaries is whether secretaries may draft any or all of the arbitral award.¹⁶⁸ In the survey used by Young ICCA discussed above, participants had much lower approval rates as the proposed duties “moved away from the purely administrative and towards tasks involving analysis and decision-making.”¹⁶⁹ For example, only 68.8% of the participants approved of a secretary performing legal research for a tribunal and only 45.2% approved of the practice of a secretary drafting part of an award.¹⁷⁰

At a Global Arbitration Review Live event in London in 2012, practitioners discussing the issue of a secretary drafting an arbitral award suggested that the practice distances the arbitrator from the dispute which allows a secretary's perspective on the case to impact the award.¹⁷¹ In other words, when arbitrators delegate the task of drafting all or part of the arbitral award to secretaries, they may be unable, despite their best efforts, to remove their own biases relating to the merits of the dispute. Thus, this viewpoint is inherently present in a secretary's draft, or even research, and has the potential to sway or undermine the arbitrator's own perspective.¹⁷²

¹⁶⁵ Moxley, *supra* note 5, at 3-4; McLean, *supra* note 36; Polkinghorne & Rosenberg *supra* note 4; CARBONNEAU, *supra* note 2, at 14 (stating that parties select their arbitrators who “ordinarily have considerable experience in the relevant business sector”).

¹⁶⁶ Bundesgericht [BGer][Federal Supreme Court] May 21, 2015, 4A_709/2014, 50 (Switz.).

¹⁶⁷ See discussion *supra* Parts II.A.1 and II.A.2.

¹⁶⁸ Karadelis, *supra* note 7 (discussing a debate regarding the proper role of secretaries in arbitral tribunals at the Global Arbitration Review Live Event in London in 2011); Spalton, *supra* note 7 (discussing the debate at the Global Arbitration Review Live Event in London in 2012 over the proper role of secretaries in drafting arbitral awards).

¹⁶⁹ Young ICCA Guide, *supra* note 8, at 2.

¹⁷⁰ *Id.*

¹⁷¹ Spalton, *supra* note 7.

¹⁷² Polkinghorne & Rosenberg, *supra* note 4.

This can be problematic, as mentioned, because of the *intuitu personae* nature of arbitrator selection, wherein these duties of a secretary “may undermine the parties’ right to select their arbitrators.”¹⁷³ As suggested by the Young ICCA survey, the closer the tasks done by the secretary get to “tasks involving analysis and decision-making,”¹⁷⁴ the more it seems that the arbitrator may have delegated his or her fundamental authority. Where the arbitrator has delegated his or her decision-making authority, he or she has potentially violated the party’s freedom of contract which was exercised in choosing that arbitrator to decide the dispute in the spirit of *intuitu personae*. Thus, in its decision to allow secretaries to draft arbitral awards, the Court may have paved the way for arbitrators to flout party autonomy and freedom of contract.

3. A Secretary’s Role in Attending Hearings or Deliberations

The Swiss Supreme Court provided as a corollary to its holding on drafting that secretaries could also attend any and all relevant hearings and proceedings.¹⁷⁵ For the secretary faced with the task of drafting an arbitral award, this position may make a great deal of sense because he or she needs to know about the dispute in order to be able to effectively write a draft. Nevertheless, it could also be very problematic. As mentioned with respect to drafting, a secretary’s own biases and perspectives may inevitably insert themselves within the draft in a way which is a potential violation of the notion of *intuitu personae*.¹⁷⁶ To protect against these possible violations, the Swiss Supreme Court stated that a secretary may only draft opinions in accordance with the instruction of the arbitrator to ensure that the arbitrator has not delegated any decision-making authority.¹⁷⁷ However, the perspectives and opinions of secretaries can still present themselves in a draft prepared under this limitation simply because they wrote it. One practitioner expressed this idea in stating that even allowing a secretary to draft the “mechanist” parts of the award like the facts or the procedure is problematic because the act of drafting is key to decision-making.¹⁷⁸

This problem is further compounded when the secretary is allowed to attend hearings and deliberations. In a situation in which the secretary has personally heard all of the evidence, witnesses, arguments, and participated, albeit perhaps only passively, in the deliberations, it is not difficult to imagine that one’s own viewpoint may become intermingled with that of the arbitrator. Where this happens, the work done by the secretary has the potential to influence the decision-making of the arbitrator.¹⁷⁹ Because

¹⁷³ Joint Report, *supra* note 3, at 586.

¹⁷⁴ Young ICCA Guide, *supra* note 8, at 2.

¹⁷⁵ Bundesgericht [BGer][Federal Supreme Court] May 21, 2015, 4A_709/2014, 50 (Switz.).

¹⁷⁶ Polkinghorne & Rosenberg, *supra* note 4.

¹⁷⁷ Bundesgericht [BGer][Federal Supreme Court] May 21, 2015, 4A_709/2014, 50 (Switz.).

¹⁷⁸ Spalton, *supra* note 7.

¹⁷⁹ Polkinghorne & Rosenberg, *supra* note 4.

the decision-making functions of an arbitrator are non-delegable,¹⁸⁰ the potential that the secretary plays a role in deciding a dispute in this capacity goes against party intent.

One solution to this problem might be that if a secretary is allowed to attend hearings and deliberations, he or she is thereafter precluded from drafting. If this were the case, the secretary tasked with drafting would only be able to draw from the information provided him or her by the arbitrator, and the risk of the secretary weighing the evidence of himself or herself may be diminished. As an example of this approach, the ICC's Note includes within its list of administrative tasks available to a secretary "attending hearings, meetings, and deliberations."¹⁸¹ The Note then provides, "Under no circumstances may the Arbitral Tribunal delegate decision-making functions to an Administrative Secretary," and includes later on that the arbitrator retains an inherent duty "personally to review the file and/or draft any decision of the Arbitral Tribunal."¹⁸² Thus, the Swiss Decision is problematic in allowing a secretary to both draft arbitral awards and attend hearings and deliberations. This creates a possibility for the secretary's own perspectives to influence the outcome of the dispute and violate party intention in naming a particular arbitrator to decide the dispute.

4. The Court's Limitation for Secretaries: Non-Delegation of Core Decision Making Functions

The Court provided one limitation after its arguably broad grant of authority to arbitral secretaries: an arbitrator may not delegate any decision making authority to the secretary.¹⁸³ Although this limitation is fairly vague and perhaps ineffective, it may in fact be consistent with other guidelines and perspectives. For example, in its Note, the ICC states that the arbitrator may not "delegate any decision making functions to an Administrative Secretary."¹⁸⁴ The AAA provides in its 2004 Code of Ethics for Arbitrators in Commercial Disputes that an arbitrator may seek the assistance of a third party, but that an arbitrator may not delegate the duty to make decisions to any other person.¹⁸⁵ The LCIA provides that the duties of the secretary should not "constitute any delegation of the Tribunal's authority."¹⁸⁶ While these example are certainly not exhaustive, they do illustrate the trend that arbitral secretaries can be useful,¹⁸⁷ but the arbitrator must stop short of delegating to them any decision-making authority.

¹⁸⁰ Bundesgericht [BGer][Federal Supreme Court] May 21, 2015, 4A_709/2014, 50 (Switz.).

¹⁸¹ ICC Note, *supra* note 8.

¹⁸² *Id.*

¹⁸³ Bundesgericht [BGer][Federal Supreme Court] May 21, 2015, 4A_709/2014, 50 (Switz.).

¹⁸⁴ ICC Note, *supra* note 8.

¹⁸⁵ AAA Code of Ethics, *supra* note 8.

¹⁸⁶ LCIA FAQ, *supra* note 63.

¹⁸⁷ Young ICCA Guide, *supra* note 8, at 2 (providing that 95% of participants believed arbitral secretaries should be used).

However, what is not clear from the Swiss Decision is how to ensure that there is in fact no delegation of decision making authority to the secretary.¹⁸⁸ As previously discussed, this line can easily be blurred the more a secretary steps away from administrative roles into things like drafting awards and attending hearings and deliberations.¹⁸⁹ For some, conducting research or drafting an award may be inherently part of the decision-making process.¹⁹⁰ Short of an arbitrator explicitly saying that he or she is delegating his decision-making authority, it is not clear in what situation this limitation could be enforced. For the Swiss Supreme Court at least, the standard seems to involve a great amount of trust in and deference to the arbitrator.¹⁹¹ This is demonstrated by the fact that in the Swiss Decision, the Court trusted the Arbitrator's statement that he had not delegated any of his decision-making authority.¹⁹²

B. Problems with Respect to the Arbitrator's Use of a Consultant

In addition to the fairly commonly discussed issues surrounding arbitral secretaries the Swiss case provides something of a novel issue to this debate, that is, the proper role of consultants in an arbitral proceeding. As previously discussed, the debates and discussions on these issues focus heavily on an arbitrator's use of secretaries, and a consultant is inherently very different. As such, the Court's almost perfunctory allowance of a consultant in the arbitral process without examining any possible differences between a consultant and secretary or the risks involved¹⁹³ could present new problems. These include how to determine when a consultant can be introduced per the Court's standard, the differences between a secretary and a consultant, and whether safeguards in place, similar to those discussed with respect to secretaries, will ensure there is no delegation of any decision-making authority.

1. Standard for Introducing Consultants into the Arbitral Process

The Court provided that an arbitrator may seek the assistance of a consultant, without the consent of the parties, when a dispute is complex or technical in nature.¹⁹⁴ However, the court did not provide a clear standard for when a dispute has met a level of

¹⁸⁸ Ensuring that there has been no delegation of decision-making authority may be a consistent problem across the other jurisdictions who also rely on this loose standard with no clear enforcement mechanism as well.

¹⁸⁹ Young ICCA Guide, *supra* note 8, at 2.

¹⁹⁰ Karadelis, *supra* note 7.

¹⁹¹ Bundesgericht [BGer][Federal Supreme Court] May 21, 2015, 4A_709/2014, 59 (Switz.).

¹⁹² *Id.*

¹⁹³ *Id.* at 51. The Court very briefly deals with the question of a consultant and does not provide an analysis of the potential risks and benefits.

¹⁹⁴ Bundesgericht [BGer][Federal Supreme Court] May 21, 2015, 4A_709/2014, 51 (Switz.).

complexity or difficulty high enough such that an arbitrator may then seek out a consultant. This standard is somewhat vague and open-ended and may allow for consultants in a large number of disputes. In addition, given that the arbitrator has the power to appoint a consultant *sua sponte*, he or she has the sole discretion to decide that the standard for a consultant has been met.¹⁹⁵ Thus, this is another standard for which the court is likely to be highly trusting of and deferential towards the arbitrator¹⁹⁶ because a reviewing court is unlikely to second-guess the arbitrator's judgment that the case has met the requisite complexity or technicality.

2. *The Nature of a Consultant*

One of the reasons that parties may decide to utilize arbitration rather than the courts is that they are able to choose their arbitrator.¹⁹⁷ A judge, by the nature of his or her profession, has to handle a wide range of disputes and may not be particularly skilled or well-versed in some specialized fields.¹⁹⁸ In contrast, parties will often name an arbitrator with experience and expertise in the industry relevant to the dispute.¹⁹⁹ In other words, there tends to be a presumption when naming an arbitrator that a person with experience and expertise in a particular industry will be the best person to render a decision on a dispute within that industry.²⁰⁰ In keeping with this, parties, in the spirit of *intuitu personae*, choose the arbitrator they think most qualified to handle their dispute, a practice which can often result in choosing one arbitral institution or tribunal over another.²⁰¹ This is the principle of freedom of contract at work, and it highlights why arbitrators are so integral to the arbitral process.

The Swiss Decision challenges these fundamental notions of freedom of contract and arbitrator selection. In holding that consultants are acceptable in disputes which are highly complex and technical enough that the arbitrator needs advice and assistance in handling the complexities, the Court was ignoring the fact that parties typically will choose an arbitrator precisely because of their special industry expertise or skill.²⁰² If the

¹⁹⁵ *Id.*

¹⁹⁶ As discussed in Part IV.A.4, the Court relied on a statement from the Arbitrator that he had not delegated any decision-making authority in its disposition of the case suggesting that in determining whether or not an arbitrator has in fact delegated decision-making authority, the reviewing court should be deferential to the representations of that arbitrator. Bundesgericht [BGer][Federal Supreme Court] May 21, 2015, 4A_709/2014, 59 (Switz.).

¹⁹⁷ CARBONNEAU, *supra* note 2, at 14 (providing as one of the reasons that parties may choose arbitration that they have the right to select their arbitrator).

¹⁹⁸ *Id.* ("By choosing to arbitrate...business parties avoid inexpert judges who may be prone to impose legalistic solutions upon commercial problems.").

¹⁹⁹ Moxley, *supra* note 5, at 3.

²⁰⁰ See CARBONNEAU, *supra* note 2, at 14; Moxley, *supra* note 5, at 4.

²⁰¹ McLean, *supra* note 36.

²⁰² See CARBONNEAU, *supra* note 2, at 14; Moxley, *supra* note 5, at 4.

parties thought that a particular arbitrator would not have been able to understand their dispute, the parties were free at the time of contract formation and arbitrator selection to choose an arbitrator that would have had the expertise to do so. That the parties named who they did suggests that the parties intended that person to handle their dispute according to his or her own knowledge and skill.²⁰³ Thus, allowing an arbitrator to name his or her own consultant without the consent of the parties, as made acceptable by the Swiss Decision, may flout party intent and violate the principles of freedom of contract and *intuitu personae*.

3. *The Court's Limitation for Consultants: Non-Delegation of Core Decision Making Functions*

The Swiss Supreme Court placed the same limitation on the use of consultants as it did secretaries: that there be no delegation of the decision-making functions of an arbitrator. However, as with secretaries,²⁰⁴ it is not clear how the Court can be sure that no delegation is occurring when the very practice of using consultants itself may lead to subtle, or even obvious, influences on the arbitrator's decision-making authority. As discussed with reference to secretaries, the very fact that a secretary is conducting research, drafting an award, or attending hearings or deliberations may allow the secretaries' opinion to sway that of an arbitrator.²⁰⁵ This may be even more true with respect to consultants who are intended by their very position to give advice and guidance to the arbitrator, as compared to the role of a secretary. The Court attempted to rectify this problem by providing that the consultant to the arbitrator could only answer questions about the technicalities and complexities of the dispute, rather than anything to do with the merits of the case.²⁰⁶ However, there is no real policing of the relationship between the consultant and the arbitrator, and, as mentioned previously, the Court suggested that the standard for evaluating whether any decision-making authority has been delegated should be very deferential to the arbitrator.²⁰⁷

These potential abuses are readily seen in the Swiss Decision itself. The consultant relied on in that case was not an expert in construction or any aspect of the construction industry. Rather, he was an expert in arbitration procedure.²⁰⁸ Thus, in the same breath that the court is saying an arbitrator may not rely on a consultant for anything other than advice on the complex and technical nature underlying a dispute, it is also endorsed the use of a consultant to help an arbitrator answer the legal questions

²⁰³ See CARBONNEAU, *supra* note 2, at 14; Moxley, *supra* note 5, at 4.

²⁰⁴ See discussion *supra* Part IV.A.4.

²⁰⁵ Polkinghorne & Rosenberg, *supra* note 4.

²⁰⁶ Bundesgericht [BGer][Federal Supreme Court] May 21, 2015, 4A_709/2014, 51 (Switz.).

²⁰⁷ *Id.* at 59.

²⁰⁸ *Id.* at 54.

surrounding the administration of arbitration itself.²⁰⁹ Further, the Court did not even provide that this particular dispute was so complicated, complex, or technical as to warrant the introduction of the consultant to answer these arbitration procedure questions in the first place.²¹⁰ Rather, the Court simply accepted the Arbitrator's statement that he felt the consultant was necessary because of the hostility evinced by Party B.²¹¹ Thus, the Court did not establish that the Arbitrator met its own standard, and in fact suggested that an arbitrator may appoint a consultant for other reasons unrelated to the complex and technical standard. This leaves the standard for introducing and using consultants unclear and open-ended.

V. PRACTICAL EFFECTS OF THE SWISS DECISION ON SWISS ARBITRATION

Switzerland does a great deal of international arbitration. Statistics indicate that "Switzerland was the second-most popular seat for arbitrations under [the ICC Rules] with 94 arbitrations commenced in 2013."²¹² Additionally, in 2014 the Swiss Chambers' Arbitration Institution administered 105 cases under the Swiss Rules of International Arbitration.²¹³ Statistics also indicate that 77% of the parties involved in the latter set of cases have a foreign domicile.²¹⁴ Given that Switzerland is a popular seat for international arbitration, this recent decision may not have a large impact on the decision to conduct arbitration within the jurisdiction.

One useful thing about the Swiss Decision is that it was an issue of first impression for the Swiss Supreme Court.²¹⁵ Thus, where there was a lack of guidance on the proper use of third parties in arbitration prior to this case, there now emerges a precedential standard. In addition, at least some parts of the Swiss Decision are consistent with other international standards.²¹⁶ These include the general approval of a secretary performing administrative tasks²¹⁷ and the limiting principle that an arbitrator may not delegate his or her decision-making authority.²¹⁸ Therefore, the decision is not likely to have a chilling effect on international arbitration in consideration of these issues.

²⁰⁹ *Id.* at 51.

²¹⁰ *Id.*

²¹¹ Bundesgericht [BGer][Federal Supreme Court] May 21, 2015, 4A_709/2014, 57 (Switz.).

²¹² Frey, Favre-Bulle, Aebi, Lenz & Staehelin, *supra* note 122.

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ Karadelis, *supra* note 10.

²¹⁶ See discussion *supra* Part IV.A.4.

²¹⁷ See e.g., Young ICCA Guide, *supra* note 8, at 2 (this survey again demonstrates that 95% of participants believed arbitral secretaries should be used.).

²¹⁸ See e.g., ICC Note, *supra* note 8; AAA Code of Ethics, *supra* note 8; LCIA FAQ, *supra* note 63.

However, in response to the liberal grant of authority to secretaries and consultants, there may be some small changes in international arbitration in Switzerland. Given that Switzerland is a popular seat of international arbitration,²¹⁹ it is unlikely that parties will completely forgo the jurisdiction. However, it might be wise for parties to consider contracting around some of the proposals of the Swiss Court to provide greater limitations on the roles of secretaries and consultants. To that end, the way parties approach contract formation may be the most significant change following the Swiss Decision.

VI. AN ATTEMPT TO SOLVE SOME OF THE PROBLEMS RAISED BY THE SWISS DECISION

With these practical considerations in mind, parties should carefully consider the effects that the Swiss Decision may have on their disputes. The case presents both consistently debated and somewhat novel issues surrounding the introduction of third parties into the arbitral process to advise and assist arbitrators. In considering these problems, this Part will attempt to provide alternative solutions for parties to consider that better reflect the fundamental principles of freedom of contract and the *intuitu personae* nature of arbitrators. Thus, these proposed solutions are predominantly focused on party behavior at the time of contract formation. As discussed, there are several other sets of model rules proposed by both commentators and arbitral institutions.²²⁰ These models are helpful in identifying some of the problems and potential solutions to the issues of secretaries to the arbitral tribunal. However, the rules proposed below are in direct reference to those issues raised in the Swiss Decision, especially with respect to the fairly novel question of an arbitrator using a consultant in an arbitral proceeding.

A. Proposed Rules for Secretaries

Given the fundamental principles of freedom of contract and the *intuitu personae* nature of an arbitrator, the hallmark of any and all proposed rules with respect to the use of arbitral secretaries is the consent of the parties. The parties are typically free to choose to go to arbitration, to choose the rules that will govern arbitration, and to choose the arbitrator that will administer arbitration and ultimately render an award.²²¹ Thus, the parties should also be free to choose whether or not the arbitrator may rely on an arbitral secretary. Given that there are discrete benefits to the use of an arbitral secretary, namely that they can provide better cost and time efficiency,²²² parties should be able to decide for themselves if these advantages outweigh any potential disadvantages.

²¹⁹ Frey, Favre-Bulle, Aebi, Lenz & Stachelin, *supra* note 122.

²²⁰ See discussion *supra* Parts II.C.1, II.C.2, and II.C.3.

²²¹ See CARBONNEAU, *supra* note 2 at 14-15 (explaining why some parties choose arbitration instead of a judicial proceeding).

²²² See discussion *supra* at Part II.A.1.

In keeping with the notions of party consent, the parties should be able to consent to the duties and tasks of the secretaries to the arbitral tribunal. In other words, it should be within the discretion of the parties as to whether a secretary may only help to organize proceedings and maintain records, or if that secretary may also attend hearings, take minutes, conduct research, or even draft arbitral awards. Thus, parties remain free to weigh the pros and cons of secretary involvement and make decisions of their own volition. In this way, the parties can ensure that the arbitrator does not delegate any duties to the secretary that the parties did not provide for in their agreement to arbitrate. Party consent, then, serves as the missing safeguard or policing mechanism to the Swiss Supreme Court's notion that arbitrators cannot delegate their decision-making authority. Where freedom of contract and party consent reigns supreme, these issues dissipate.

B. Proposed Rules for Consultants

Party consent may be even more important for consultants. As previously noted, parties select arbitrators with that particular person's experience, expertise, or skill in mind with the assumption that the person will best be able to render a decision in the context of that party's particular industry.²²³ If a party is able to so carefully choose an arbitrator based on his or her skill, a party should also be able to choose the consultant that an arbitrator may rely on in the event that assistance is necessary. This way, the parties maintain the same level of control over the skill and expertise of those involved in handling the dispute. Thus, some form of party consent over the person chosen as the consultant would be more effective in protecting the interests of the parties. One might consider as an example the HKIAC rule regarding Tribunal-Appointed Experts.²²⁴ While these rules also do not require party consent at the outset of appointing an expert, and state that an arbitrator may meet with the expert privately, they also provide that the parties are given a copy of the expert's report and have an opportunity to not only question the findings of the expert but to question the expert himself.²²⁵ Requiring party consent at the outset would provide even more protection for the parties. However, this example from the HKIAC does illustrate that the Swiss Supreme Court may not have provided clear or sufficient safeguards against unilateral imposition of a consultant by an arbitrator and the dangers this may pose.²²⁶

It may also be necessary to clarify when a consultant may enter the proceedings. Under the Swiss Decision, an arbitrator may seek out the advice of a consultant when the

²²³ See CARBONNEAU, *supra* note 2, at 14; Moxley, *supra* note 5, at 3-4; McLean, *supra* note 36.

²²⁴ HKIAC Rules, *supra* note 8.

²²⁵ HKIAC Rules, *supra* note 8.

²²⁶ Allowing the parties to have this degree of oversight over the arbitral tribunal and the consultant may protect their respective interests, but it may also slow down the efficiencies of arbitration. However, the suggestions posed here assume that parties should be able to weigh the advantages of arbitrator selection over efficiency if they choose. For a proposal which is more focused on increasing the efficiency of arbitration, see Meyer & Baier, *supra* note 14.

dispute is complex or technical.²²⁷ However, this kind of loose or vague standard may open the door to the use of consultants in many arbitral proceedings. Thus, the parties should be able to decide if and when an arbitrator may rely on the assistance of a consultant. If the parties are unable to agree, the default rule should be that no consultant can be used. At the very least, the parties agreed to arbitrate and agreed that the arbitrator or arbitral tribunal would administer the dispute. Thus, when the parties cannot agree if a consultant can or should be used, the arbitration should proceed under those terms to which the parties have agreed.

Lastly, if the parties do agree that the arbitrator may rely on a consultant under certain circumstances, the parties should also be free to designate the scope of that consultant's authority. This is especially important in light of the Swiss Decision, where the Court limited the authority of consultants to technical, non-legal questions about the dispute,²²⁸ but then approved of the use of a consultant whose expertise was solely in administration procedure.²²⁹ Therefore, parties should be able to contractually limit the type of consultant which can be used during the proceeding and the type of questions he or she may be asked. As an example, in the case at issue, the parties could have specified that the arbitrator could designate a consultant whose expertise was in some specialized aspect of the construction industry.

VII. CONCLUSION

The Swiss Supreme Court's opinion highlights some of the problems surrounding the introduction of third parties to assist an arbitrator. An arbitrator has been entrusted by the parties to decide the dispute according to his or her own knowledge and judgment of the issues. Thus, in situations where an arbitrator has relied on the help and advice of secretaries and consultants, it is possible that the arbitrator has betrayed the trust placed in him or her by the parties and delegated his or her authority in a way that violates the parties' agreement. For secretaries, this may be especially true in situations where the arbitrator allows the secretary to draft arbitral awards and attend hearings and deliberations. The problems may be even clearer with respect to consultants, who by their very nature are there to advise the arbitrator, not just assist the arbitrator with administrative tasks.

Given the fundamental principle of freedom of contract wherein the parties are free to choose arbitration and who their arbitrator will be, many of the problems surrounding the use of third parties in arbitral proceedings can be solved by focusing on party consent. While the focus on party consent may hamper some of the cost-saving and time-saving advantages of relying on a third party in arbitral proceedings, the parties should have the right to ensure that their dispute is being decided by the person or persons whom they have appointed and to weigh the advantages and disadvantages of third party assistance for themselves.

²²⁷ Bundesgericht [BGer][Federal Supreme Court] May 21, 2015, 4A_709/2014, 51 (Switz.).

²²⁸ Bundesgericht [BGer][Federal Supreme Court] May 21, 2015, 4A_709/2014, 51 (Switz.).

²²⁹ *Id.* at 59.